

1  
2  
3  
4  
5  
6 UNITED STATES DISTRICT COURT  
7 EASTERN DISTRICT OF WASHINGTON

8 UNITED STATES OF AMERICA,

9 Plaintiff,

10 v.

11 ANTONIO AGUILAR-LOPEZ,

12 Defendant.

Nos. 2:09-CR-06045-EFS-1  
4:17-CV-05095-EFS

ORDER DENYING § 2255 MOTION

CLERK'S OFFICE ACTION REQUIRED

13  
14 Before the Court is a motion submitted by Antonio Aguilar-Lopez  
15 in which he attacks his conviction and sentence for being an alien in  
16 the U.S. after deportation. See ECF No. 143.<sup>1</sup> Having previously  
17 provided Mr. Aguilar-Lopez with an opportunity to either withdraw or  
18 amend his § 2255 motion, see ECF No. 144, and receiving nothing from  
19 him within the allotted time, the Court denies his motion.

20 ////

21 ///

22 //

23 /

24  
25 <sup>1</sup> Unless noted otherwise, all record citations refer to case No. 2:09-CR-  
26 06045-EFS-1.

1                                   **I.     FACTS AND PROCEDURAL HISTORY<sup>2</sup>**

2           On June 4, 2007, Mr. Aguilar-Lopez was ordered removed from the  
3 United States to Mexico by an immigration judge.   Thereafter, Mr.  
4 Aguilar-Lopez reentered the United States without permission.   On July  
5 10, 2009, he was arrested in Benton County, Washington.   The  
6 Government filed an indictment against Mr. Aguilar-Lopez on one count  
7 of Alien in the United States After Deportation, in violation of 8  
8 U.S.C. § 1326(a).

9           On June 12, 2010, Mr. Aguilar-Lopez moved to dismiss the  
10 indictment pursuant to 8 U.S.C. § 1326(d), arguing that under *Padilla*  
11 *v. Kentucky*, 559 U.S. 356 (2010), he had received ineffective  
12 assistance of counsel in connection with the underlying Nevada state  
13 conviction.   Mr. Aguilar-Lopez alleged a failure of his counsel to  
14 advise him of the immigration consequences of his guilty plea to the  
15 state offense.   The Court denied the motion, finding *Padilla* did not  
16 apply retroactively.

17           On July 23, 2010, Mr. Aguilar-Lopez entered a guilty plea  
18 pursuant to a written plea agreement to Being an Alien in the United  
19 States after Deportation in violation of 8 U.S.C. § 1326(a).   On  
20 February 23, 2012, the Court sentenced Mr. Aguilar-Lopez to ten  
21 months' imprisonment, three years of supervised release, a \$100  
22 special assessment, and no fine.   On October 28, 2013, the United  
23

24           <sup>2</sup> These facts were stated with citations to the electronic record in the  
25 Court's prior order, ECF No. 144.   For the convenience of Mr. Aguilar-  
26 Lopez, who is a pro se prisoner, the Court restates the facts here as  
well.

1 States Court of Appeals for the Ninth Circuit affirmed his conviction.  
2 And on March 3, 2014, Mr. Aguilar-Lopez filed an untimely petition for  
3 writ of certiorari with the United States Supreme Court that was  
4 subsequently denied on April 21, 2014.

5 On June 26, 2014, Mr. Aguilar-Lopez filed a Motion to Vacate,  
6 Set Aside, or Correct Sentence under 28 U.S.C. § 2255. That § 2255  
7 motion was dismissed without prejudice, however, when the Court  
8 granted Mr. Aguilar-Lopez's request to voluntarily withdraw it.

9 On September 23, 2016, the Nevada state court dismissed Mr.  
10 Aguilar-Lopez's conviction in Case No. 07F09531, in which he was  
11 charged with Trafficking in Controlled Substance, Conspiracy to  
12 Violate Controlled Substance Act, and Possession of Controlled  
13 Substance. On January 6, 2017, Mr. Aguilar-Lopez filed a document  
14 labeled as a "Petition for Writ of Habeas Corpus," and citing 28  
15 U.S.C. § 2241, in the Central District of California. The District  
16 Court for the Central District of California, however, correctly  
17 construed that document as a disguised motion seeking relief under 28  
18 U.S.C. § 2255. As such, on July 11, 2017, the case was transferred to  
19 this Court.

20 On September 22, 2017, this Court entered an order notifying Mr.  
21 Aguilar-Lopez that his motion would be construed as brought under  
22 § 2255. See ECF No. 144. The Court advised Mr. Aguilar-Lopez that  
23 "this recharacterization means that any subsequent § 2255 motion will  
24 be subject to the restrictions on 'second or successive' motions."  
25 *Castro v. United States*, 540 U.S. 375, 383 (2003). The Court further  
26 warned Mr. Aguilar-Lopez that an initial review suggested his motion

1 lacked merit. The Court therefore allowed Mr. Aguilar-Lopez to either  
2 amend or withdraw his motion on or before Friday, October 27, 2017.  
3 ECF No. 144. The Court, however, has not received any further filings  
4 from Mr. Aguilar-Lopez.

## 5 **II. DISCUSSION**

6 Mr. Aguilar-Lopez alleges that his 2007 deportation proceedings  
7 were unlawful because his underlying state conviction (resulting from  
8 his plea of nolo contendere for misdemeanor drug possession) was  
9 subsequently dismissed by the Nevada state courts. See ECF No. 143 at  
10 3. According to Mr. Aguilar-Lopez, it was his Nevada conviction that  
11 was used as the basis for his removal. Further, Mr. Aguilar-Lopez  
12 seemingly views his Nevada conviction, his removal order, and his  
13 judgment in this case as three dominos in a row. Mr. Aguilar-Lopez  
14 contends that because the Nevada conviction has fallen, his 2007  
15 deportation was unlawful and must fall as well. This, in turn, should  
16 topple his illegal-reentry conviction in this matter and the resulting  
17 sentence.

18 The Court need not decide, however, whether a removal order is  
19 somehow rendered invalid simply because the underlying state  
20 conviction is subsequently vacated. Here, it appears that Mr.  
21 Aguilar-Lopez's Nevada conviction did not form the basis of his 2007  
22 removal. Instead, Mr. Aguilar-Lopez entered a stipulated request for  
23 removal based on an "entry without inspection" charge. See Case No.  
24 4:17-CV-05095-EFS, ECF No. 7-1 at 127; see also 8 U.S.C.  
25 § 1182(a)(6)(A)(i). The immigration judge cited to the charges  
26 contained in the Notice to Appear, which stated the basis for removal

1 was that Mr. Aguilar-Lopez was not a citizen or national of the U.S.;  
2 he was a native of Mexico and a citizen of Mexico; he arrived in the  
3 U.S. at or near San Ysidro, California, on or about February 2007; and  
4 he was not then admitted or paroled after inspection by an immigration  
5 officer. See Case No. 4:17-CV-05095-EFS, ECF No. 7-1 at 125. There is  
6 no indication that Mr. Aguilar-Lopez's 2007 removal was in any way  
7 based on his Nevada conviction. As such, Mr. Aguilar-Lopez has not  
8 shown any basis for relief from the judgment in this case.

9 For the aforementioned reasons, **IT IS HEREBY ORDERED:**

10 1. Mr. Aguilar-Lopez's construed Motion to Vacate, Set Aside,  
11 or Correct Sentence Pursuant to § 2255, **ECF No. 143**, is  
12 **DENIED**.

13 2. The Court declines to issue a certificate of appealability.  
14 See 28 U.S.C. § 2253(c) (allowing such a certificate "only  
15 if the applicant has made a substantial showing of the  
16 denial of a constitutional right").

17 3. This file shall remain **CLOSED**.

18 4. The Clerk's Office is **DIRECTED** to **CLOSE** the corresponding  
19 civil case, **No. 4:17-CV-05095-EFS**.

20 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this  
21 Order in both **No. 2:09-CR-06045-EFS-1** and **No. 4:17-CV-05095-EFS** and to  
22 provide copies to Mr. Aguilar-Lopez and all counsel.

23 **DATED** this   1<sup>st</sup>   day of November 2017.

24 \_\_\_\_\_s/Edward F. Shea  
25 EDWARD F. SHEA  
26 Senior United States District Judge